IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 1219/DEL/2017
[Assessment Year: 2012-13]

ESPN Star Sports Mauritius SNC et Compagnie [Now known as ESS Advertising (Mauritius) SNC et Compagnie] 5th Floor, Ebene Esplanade, 24, Cyber City, Ebene Mauritius.	Vs.	The Dy. C.I.T Circle 1(2)(2) [Intl. Taxation New Delhi
PAN : AABFE 6801 E		
[Appellant]		[Respondent]

Date of Hearing : 11.10.2021
Date of Pronouncement : .10.2021

Assessee by : Shri Poras Kaka, Sr. Adv
Shri Dinesh Chawla, Adv

Revenue by : Shri Gangadhar Panda, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is directed towards the order of the CIT(A)-42, New Delhi dated 30.12.2016 pertaining to A.Y 2012-13.

2. Grievances of the assessee read as under:

"1. That on facts and in law, the appellant denies its liability to be "assessed" under the Income-tax Act, 1961 ('the Act') and the assessment order made under section 143(3) of the Act is bad in law.

2. That on the facts and circumstances of the case and in law, Ld. CIT(A) erred in upholding the order of the Learned Assessing Officer ('Ld. AO') that the appellant has a business connection in the form of Star Sports India Private Limited ('SSIPL') (earlier known as ESPN Software India (P) Ltd.) (now merged with Star India Private Limited) and that the appellant is carrying on its business in India and earning its income from sources in India in terms of Section 9(1)(i) of the Act.

3. That on the facts and circumstances of the case and in law, Ld. CIT(A) grossly erred in upholding the order of the Ld. AO that appellant has a Fixed Place Permanent Establishment ('PE') in the form of SSIPL under the Double Taxation Avoidance Agreement entered between India and Mauritius ('DTAA').

4. That on the facts and circumstances of the case and in law, Ld. CIT (A) grossly erred in upholding the order of the Ld. AO that the appellant has a dependent agent PE in the form of SSIPL under Article 5(4) and 5(5) of the DTAA without appreciating the fact that SSIPL is also engaged in distribution of channels in India under separate agreements with ESS Distribution (Mauritius) SNC et Compagnie ('ESSD').

5. That without prejudice to the above grounds, the Ld. CIT(A) grossly erred in rejecting the contention of the appellant that where the purported PE is remunerated on an arm's length basis, no additional profits could be attributed to appellant's income.

6. That, without prejudice to the above and in the alternative, Ld. CIT (A) has grossly erred on the facts and circumstances of the case and in law in attributing 50% of the net profits of the appellant as the profits of the appellant from its Indian operations.

That the above grounds of appeal are without prejudice to each other.

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. The grievances of the assessee can be summarised as under:

1. Whether the appellant has a business connection in India and is taxable in terms of section 9(1) of the Act ? and

Whether the appellant has a permanent establishment (PE) under Article 5(2) & 5(4)/ 5(5) of the India-Mauritius DTAA ?

2. When the purported PE is remunerated on an arm's length basis, no additional profits could be attributed to the appellant's income.

4. Representatives of both the sides were heard at length. Case records carefully perused and judicial decisions relied upon by the counsel duly considered.

5. Briefly stated, the facts of the case are that the appellant is a partnership firm established under the laws of Mauritius and is engaged in the business of selling advertisement time and programme sponsorship from Mauritius in connection with the programming via non-standard television on ESPN, Star Sports and Start Cricket programming services.

4. During the year under consideration, the appellant has also entered into such services with respect to ESPN HD Channel. Its partners are worldwide Wickets Mauritius having 99.9 shares in profit and ESS Asian Networks Pte Ltd New Tech Park, Singapore having 0.1% in the profit.

5. In Form No. 3CEB, gross receipts on sale of advertisement inventory have been shown at Rs. 344,40,06,771/-. Details of Associated Enterprise [AE] was given i.e. ESPN Software India Pvt. Ltd

from whom advertisement sales inventory cost amounting to Rs. 344,40,06,771/- were received.

6. A reference was made to the TPO u/s 92CA(1) of the Act for computing arm's length price of the international transactions. The TPO, vide order dated 07.01.2016, accepted the value of international transactions and no adverse inference was drawn.

7. Assessment history of the appellant shows that for the past A.Ys., ESPN India has been held to be dependent agent PE and fixed place PE of the assessee. It was pointed out during the course of assessment proceedings for A.Y 2005-06 and 2006-07 that there was considerable change in the activities as compared with the earlier years.

8. Vide order-sheet note dated 29.01.2016, the assessee was asked to provide whether there was any change in the business model/factual matrix of the assessee during the year under consideration vis a vis previous year i.e. 2011-12.

9. The assessee responded by stating that there is no change in the business model/factual matrix of the assessee during the year as compared to the preceding year.

10. Taking a leaf out of the assessment of A.Y 2011-12, the Assessing Officer concluded "Therefore, keeping in view the facts and circumstances as above, since there is admittedly no change in the facts of the case, the assessment for this year is being completed on the same lines". This means that the Assessing Officer has concluded the assessment proceedings of the year under consideration on the same lines as it was done in A.Y 2011-12.

11. In so far as the existence of fixed place PE is concerned, the findings of the Assessing Officer read as under:

> "The premises of ESPN India, are therefore, a fixed place PE of the assessee from where business of the assessee is being carried out in terms of Article 5(2)(a) of the DTAA. Based on these facts it is concluded that for all practical purposes this distinction between the two has become insignificant and when a prospective advertising client deals with ESPN, it is as if he were dealing directly with ESSM. This view is supported by the decision of the Special Bench of the Delhi ITAT in the case of M/s Nokia Networks OY Vs. DCIT, Non Resident Circle and also by the judgment of the Andhra Pradesh High Court in the case of CIT Vs. Visakhapatnam Port Trust 144 ITR 146.

> 13.2 In view of the discussion above, it is Held that the assessee also has a fixed place PE in terms of provisions of Article 5(2)(a) of the DTAA, in addition to a Dependent Agent Permanent Establishment in India as discussed above."

12. After giving the aforementioned findings, the Assessing Officer proceeded by attribution of profit to PE and attributed 30% of the gross advertising revenue and made attribution of Rs. 103,32,02,031/-.

13. The assessee carried the matter before the ld. CIT(A) but without any success.

14. As mentioned elsewhere, the Assessing Officer and the ld. CIT(A) have proceeded on the findings given in Assessment Year 2011-12 wherein the quarrel travelled upto the Tribunal and the Tribunal in ITA No. 3760 and 4242/DEL/2016 for Assessment Years 2009-10 and 2011-12 has decided the quarrel as under:

> "12. We have heard the rival contentions and perused the record. The assessee is a partnership firm established under the laws of Mauritius on March 29, 2002. The assessee is engaged in the business of acquiring and allotting advertisement time ('Airtime') and programme sponsorship in connection with programming via non-standard television from Mauritius on ESPN, Star Sports and Star

Cricket Programming services. The assessee had entered into agreement with ESPN Software India (P) Ltd., incorporated under the laws of India which was engaged in the business of acquiring the airtime from assessee and allotting it to various Indian advertisers and advertising agencies. The sale of airtime by the assessee to ESPN India is outside India. Further, the assessee has no office in India and/or any operations in India. The plea of the assessee before the lower authorities was that ESPN India purchased airtime from the assessee on Principal to Principal basis. The assessee claimed that the income arising from advertisement airtime is business income and in the absence of a PE of the assessee in India, the same is not taxable. The Assessing Officer relying upon the orders of Assessment Years 2003-04 and 2004-05 held the transaction to be principal to agent and not on Principal to Principal basis. Further, ESPN India was constituted to be dependent agent as per Article- 5(4) and not an independent agent as defined by Article 5(5) of the India- Mauritius DTAA. The Assessing Officer attributed part of the gross profits to the PE. The CIT(A) also held that ESPN India constitutes PE under the India-Mauritius DTAA. However, he allowed partial relief to the assessee on the attribution of income to the DAPE in India.

13. The case of the assessee before us is that without prejudice to its contention on there being PE or dependent agent PE or not, when ESPN India is remunerated at arm's length basis then no further attribution of profits can be made in the hands of the assessee in India. The TPO in the order relating to Assessment Years 2009-10 and 2011-12 has held that the international

transaction of payment of advertising sales inventory cost to be at arm's length price. Copies of the orders of the TPO in the case of the assessee and also ESPN India have been filed during the course of hearing. Once, the transactions are demonstrated to be in accordance with arm's length principle then the question which arises is whether there can be any attribution of profits, even if, assesse has PE in India. We are not going in to the aspect of whether the assessee has PE or dependent agent PE in ESPN India for deciding the present issue raised before us. We are limiting our decision to further attribution of profits, in case, where once arm's length principle has been decided then, the Hon'ble Supreme Court has laid down the proposition that there can be no further profit attribution to a person, even if, it has a PE in India. The Hon'ble Supreme Court in Honda Motors Co. Ltd. vs ADIT in Civil Appeal Nos.2833 to 2840 of 2018, judgement dated 14.03.2018, reported in [2018] 92 taxmann.com 353 (SC) held as under:-

> 3. In the judgement of this Court dated 24.10.2017 in Asstt.DIT vs E-funds IT Solutions Inc. [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34 (SC) and connected matters, it has been held that once arm's length principle has been satisfied, there can be no further profit attributable to a person even if it has a permanent establishment in India.
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> 4. Since, the impugned notice for the reassessment is based only on the allegation that the appellant(s) has permanent

establishment in India, the notice cannot be sustained once arm's length price procedure has been followed.

5. Accordingly, the impugned order(s) is set aside and the appeals are allowed."

14. Similar proposition has been laid down by the Hon'ble Apex Court in Asstt. DIT vs E-funds IT Solutions Inc. [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34 (SC) as in Honda Motors Co. Ltd. vs ADIT (Supra). The Hon'ble Supreme Court in DIT vs Morgan Stanley and Co. (supra) have also held as under

"33. To conclude, we hold that the AAR was right in ruling that MSAS would be a Service PE in India under Article 5(2)(1), though only on account of the services to be performed by the deputationists deployed by MSCo and not on account of stewardship activities. As regards income attributable to the PE (MSAS) we hold that the Transactional Net Margin Method was the appropriate method for determination of the arm's length price in respect of transaction between MSCo and MSAS. We accept as correct the computation of the remuneration based on cost plus mark-up worked out at 29% on the operating costs of MSAS. This position is also accepted by the Assessing Officer in his order dated 29.12.06 (after the impugned ruling) and also by the transfer pricing officer vide order dated 22.9.06. As regards attribution nof further profits to the PE of MSCo where the connection, the department has

> also to examine whether the PE has obtained services from the multinational transaction between the two are held to / be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risktaking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE. The situation would be different if the transfer pricing analysis does not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the PE for those functions/risks that have not been considered. The entire exercise ultimately is to ascertain whether the service charges payable or paid to the service provider (MSAS in this case) fully represents the value of the profit attributable to his service. In this enterprise at lower than the arm's length cost? Therefore, the department has to determine income, expense or cost allocations having regard to arm's length prices to decide the applicability of the transfer pricing regulations" (emphasis supplied)."

15. The said proposition have been also followed by the Hon'ble Delhi High Court in BBC Worldwide Limited (supra) and it has been held that if arm's length remuneration is paid to the dependent agent, nothing further remains to be attributed. In the case before Hon'ble Delhi High Court, the assessee was foreign telecasting company similar to the assessee, which had appointed its subsidiary in India to solicit

orders for the sale of advertising airtime to different channels. The Assessing Officer held that the company had a DAPE under Article 5 of the DTAA and attributed 20% of the total advertisement revenue to India. The relevant extract of the decision is as under:-

> "16. When the aforesaid factual position is kept in mind, the judgment of the Bombay High Court in Set Satellite (Singapore) Pte. Ltd's. case (supra) is clearly attracted. In that case the High Court has held that if correct ALP is applied and paid, nothing further would be left to be taxed in the hands of the foreign enterprise. In the said case, Morgan Stanley & Co. Inc.'s case (supra) as well as Circular NO.23 issued by the CBDTwas taken into consideration. The Court was also pleased to record that the commission paid to the agent was 15% services performed by the Assessee's agent in India was in line with the existing industry standards in India at the prevalent time. Reliance was also placed on Para 3 of Circular NO.742 dated 02.5.1996 issued by the CBDT, which referred to the fact that the agent's commission from foreign telecasting companies is 15% or so of the gross sum, to contend that the CBDT itself had considered 15% as the normally accepted commission rate payable to agents of the telecasting companies." (emphasis applied)

16. In applying the aforesaid proposition to the issue raised before us and without deciding the issue of whether ESPN India constitutes PE of the assessee in India under DTAA between India

and Mauritius on the principle that ESPN India was remunerated at arm's length by the assessee, which has been accepted by the Assessing Officer/TPO of ESPN India and also the assessee, then no further attribution of profits is to be made in the hands of the assessee. Similar proposition has also been laid down by the Tribunal in assessee's own case for Assessment Years 2003-04 and 2004- 05. Accordingly, we hold so. Ground of appeal no.5.1 is thus decided and other grounds of appeal become academic."

15. Though the co-ordinate bench has not touched upon the issue whether ESPN Star Sports constitutes PE of the assessee in India under DTAA between India and Mauritius, howeve, we find that the Hon'ble Supreme Court in the case of E-funds IT Solutions Inc. 399 ITR 34 had an occasion to consider the test for whether there is fixed place PE. The relevant extracts read as under:

"5. As against this, Shri S. Ganesh, learned senior counsel for the respondents, has argued that the tests for whether there is a fixed place PE have now been settled by the judgment of this Court in Formula One (supra), and that it is clear that for a fixed place PE, it must be necessary that the said fixed place must be "at the disposal" of the assessees, which means that the assessees must have a right to use the premises for the purpose of their own business, which has not been made out in the facts of this case. He further argued that, on the facts of this case, both the US

companies as well as the Indian company pay income tax, and the Transfer Pricing Officer by his order dated 22nd February, 2006, has specifically held that whatever is paid under various agreements between the US companies and the Indian company are on arm's length pricing and that, this being the case, even if a fixed place PE is found, once arm's length price is paid, the US companies go out of the dragnet of Indian taxation. He also adverted to Article 5(6) to state that the mere fact that a 100% subsidiary may be carrying on business in India does not by itself means that the holding company would have a PE in India. Further, according to learned counsel, so far as the service PE is concerned, even the assessing officer did not find that such a PE existed.

According to him, under Article 5(2)(l), it is necessary that the foreign enterprises must provide services to customers who are in India, which is not Revenue's case as all their customers exist only outside India. Further, according to the learned counsel, the entire personnel engaged in the Indian operations are employed only by the Indian company and the fact that the US companies may indirectly control such employees is only for purposes of protecting their own interest. Ultimately, there are four businesses that the assessees are engaged in, namely, ATM Management Services, Electronic Payment Management, Decision Support and Risk Management and Global Outsourcing and Professional Services. Since all these businesses are carried on outside India and the property through which these businesses are carried out, namely ATM networks, software solutions and other hardware networks and information technology infrastructure were all located outside

India, the activities of e-Funds India are independent business activities on which, as has been noticed by the High Court, independent profits are made and income assessed to tax under the Income Tax Act. According to the learned counsel, "agency PE" was never argued before the assessing officer and even before the ITAT. Therefore, no factual foundation for the same has been laid. Equally, according to the learned counsel, the settlement procedure availed for the assessment years in question cannot be said to be binding for subsequent years as they were without prejudice to the assessees' contention that they have no PE in India. He also relied upon the OECD Commentary, paragraph 3.6 in particular, to demonstrate that the so-called admissions made and relied upon by the three authorities below were correctly overturned by the High Court.

Learned counsel also stated that the ground of adverse inference was never argued or put before any of the authorities below, and the only place that it could be found is in the assessment order for the year 2003-04, which order became non est as it was substituted by the agreement entered into between the parties ending in withdrawal of appeals before the CIT (Appeals). Thus, according to the learned counsel, the view of the High Court is absolutely correct and should not be interfered with. Learned counsel also argued that the cross- appeals of the Revenue were correctly dismissed in that, even though the ITAT decided the case in law against the assessees, yet it found on facts, differing from the calculation formula by the authorities below, that nil tax was payable. This is the only part of the ITAT judgment upheld by

the High Court, and should not, therefore, be disturbed in any case.

6. Before we deal with the submissions made on both sides, it is necessary to first set out the statutory background. This is contained in Section 90 of the Income Tax Act, before it was amended in 2009. Section 90(1) and 90(2) of the Income Tax Act, as it then stood, read as under:

"Section 90. Agreement with foreign countries.—

1) The Central Government may enter into an agreement with the Government of any country outside India—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country; or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

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8. xxx
9. xxx
10. xxx
11. xxx

12. Thus, it is clear that there must exist a fixed place of business in India, which is at the disposal of the US companies, through which they carry on their own business. There is, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business has been put at the disposal of these companies. The assessing officer, CIT (Appeals) and the ITAT have essentially adopted a fundamentally erroneous approach in saying that they were contracting with a 100% subsidiary and were outsourcing business to such subsidiary, which resulted in the creation of a PE. The High Court has dealt with this aspect in some detail in which it held:

> "49. The Assessing Officer, Commissioner (Appeals) and the tribunal have primarily relied upon the close association between e-Fund India and the two assessees and applied functions performed, assets used and risk assumed, criteria to determine whether or not the assessee has fixed place of business. This is not a proper and appropriate test to determine location PE. The fixed place of business PE test is different. Therefore, the fact that e-Fund India provides various services to the assessee and was dependent for its earning upon the two assessees is not the relevant test to determine and decide location PE. The allegation that e-Fund India did not bear sufficient risk is irrelevant when deciding whether location PE exists. The fact that e-Fund India was reimbursed the cost of the call centre operations plus 16% basis or the basis of margin fixation was not known, is not relevant for determining location or fixed place PE.

Similarly what were the direct or indirect costs and corporate allocations in software development centre or BPO does not help or determine location PE. Assignment or sub-contract to e-Fund India is not a factor or rule which is to be applied to determine applicability of Article 5(1). Further whether or not any provisions for intangible software was made or had been supplied free of cost is not the relevant criteria/test. e-Fund India was/is a separate entity and was/is entitled to provide services to the assessees who were/are independent separate taxpayers. Indian entity i.e. subsidiary company will not become location PE under Article 5(1) merely because there is interaction or cross transactions

between the Indian subsidiary and the foreign Principal under Article 5(1). Even if the foreign entities have saved and reduced their expenditure by transferring business or back office operations to the Indian subsidiary, it would not by itself create a fixed place or location PE. The manner and mode of the payment of royalty or associated transactions is not a test which can be applied to determine, whether fixed place PE exists."

13. It further went on to hold that the ITAT's finding that the assessees were a joint venture or sort of partnership with the Indian subsidiary was wholly incorrect. Also, none of these arguments have been invoked by the Revenue and such a finding would, therefore, be perverse. After citing Klaus Vogel on Double Taxation Conventions, Arvid A. Skaar in Permanent Establishment: Erosion of a Tax Treaty Principle and Bollinger vs. Commissioner, 108 S.Ct. 1173, the High Court found against the Revenue, holding that there is no fixed place PE on the facts of the present case. We agree with the findings of the High Court in this regard.

14. Reliance placed by the Revenue on the United States Securities and Exchange Commission Form 10K Report, as has been correctly pointed out by the High Court, is also misplaced. It is clear that the report speaks of the e-Funds group of companies worldwide as a whole, which is evident not only from going through the said report, but also from the consolidated financial statements appended to the report, which show the assets of the group worldwide.

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> 16. This report would show that no part of the main business and revenue earning activity of the two American companies is carried on through a fixed business place in India which has been put at their disposal. It is clear from the above that the Indian company only renders support services which enable the assessees in turn to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE and the High Court judgment is, therefore, correct on this score."

16. Considering the past history of the assessee in light of the decision of this Tribunal [supra] read with the decision of the Hon'ble Supreme Court in the case of E-funds IT Solutions Inc. [supra], we hold that the assessee has no business connection in India in terms of section 9(1) of the Act and has no PE under Article 5(2), 5(4) and 5(5) of India Mauritius DTAA.

17. Since we have held that there is no PE, we are of the considered view that there cannot be any attribution of profit as held by this Tribunal in assessee's own case in A.Ys 2009-10 and 2011-12.

18. For the sake of completeness of the adjudication, and as mentioned elsewhere, the TPO has accepted the international transactions at Arm's length and no adverse inference was drawn. We

have also gone through the TP assessment order and find no adjustment.

19. In the result the appeal of the assessee in ITA No. 1219/DEL/2017 is allowed.

The order is pronounced in the open court in the presence of both the representatives on .10.2021.

Sd/- **Sd/-**

[AMIT SHUKLA]
JUDICIAL MEMBER

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated : 20th October, 2021

VL/

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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